U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 8 2013 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition on June 22, 2007. The petitioner subsequently filed an appeal on July 23, 2007, which the Administrative Appeals Office (AAO) summarily dismissed on December 8, 2009. On February 12, 2010, the AAO reopened the matter and adjudicated the appeal on its merits. On February 24, 2010, the petitioner filed a motion to reconsider. The AAO granted the motion and reaffirmed the denial of the petition on October 4, 2011. The matter is now before the AAO on a second motion to reconsider. The motion to reconsider will be dismissed. The previous AAO decision will be affirmed, and the petition will remain denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an attorney. The petitioner did not submit an approved labor certification with the petition. The director found that the petitioner did not qualify for classification as a member of the professions holding an advanced degree, and came to no conclusion regarding an alternative finding that the petitioner qualified an alien of exceptional ability. The director found that the petitioner had not shown that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

In prior decisions, the AAO found that the petitioner had failed to establish sufficient work experience, and then found that the petitioner's intended work as an attorney lacks national scope. In its most recent decision, the AAO explained that the initial petition, a self-petition unsupported by a certified alien employment certification that explicitly did not seek a national interest waiver from that requirement, was never approvable.[1] The AAO noted the petitioner's failure to cite any legal authority for the proposition that he did not need a national interest waiver from the alien employment certification requirement because it was not a requirement for self-employed petitioners. Despite the petitioner's failure to request a national interest waiver initially or on appeal, the AAO considered the issue in light of the prior adjudications based on that issue and concluded that the petitioner had not demonstrated eligibility for that waiver.

On motion, the petitioner asserts that he is, in fact, eligible for the national interest waiver of the alien employment certification based on a 1992 federal court decision and recently articulated U.S. Citizenship and Immigration Services (USCIS) policy regarding entrepreneurs.

I. THE LAW

Section 203(b) of the Act states in pertinent part that:

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[1] The regulation at 8 C.F.R. § 204.5(k)(1) provides that, unless seeking an exemption from the alien employment certification requirement pursuant to section 203(b)(2)(B) of the Act, the national interest waiver provision, only a "United States employer" may file a petition under section 203(b)(2) of the Act.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(ii) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer.

(ii) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

II. ISSUES ON MOTION

On motion, the petitioner continues to assert that he qualifies as an alien of exceptional ability. As explained in the AAO's most recent decision, however, this issue is moot because the record establishes that the petitioner holds a Juris Doctor degree from The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The issue under consideration is whether there is a requirement for submission of an alien employment certification approved by the Department of Labor (DOL) and, if so, whether the petitioner qualifies for a waiver of that requirement in the national interest. Previously the petitioner has asserted that no such requirement exists. On motion, the petitioner now abandons that claim and asserts in the alternative that he qualifies for the national interest waiver.

III. REQUIREMENTS FOR A MOTION

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests

the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 402-403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that the party could not have addressed previously. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

IV. ANALYSIS

With the current motion, the petitioner failed to submit a statement regarding whether the validity of the AAO's decision has been, or is, subject of any judicial proceeding. This shortcoming alone allows USCIS to dismiss the motion. *See* 8 C.F.R. § 103.5(a)(4). Notwithstanding this omission, the motion fails to meet the specific requirements of a motion to reconsider.

As stated above, the petitioner initially filed the Form I-140 petition by checking box "d," which states that the petitioner "is **NOT** seeking a National Interest Waiver." (Emphasis in original.) In response to the director's July 3, 2006 Request for Evidence, the petitioner stated that his self-employment since 2004 "justifies the consideration of a national interests waiver." Based on that statement, the director issued a second Request for Evidence on February 1, 2007, advising of the requirements for the waiver. In response and again on appeal, the petitioner reverted to the claim on the initial petition that he was not seeking a national interest waiver because no alien employment certification was required for self-employed petitioners.

With the present motion, the petitioner abandons his prior claims that an alien employment certification is not required for self-employed petitioners. Rather, he now acknowledges that self-employed petitions filing in their own behalf must seek a national interest waiver of that requirement. He relies on two authorities for the conclusion that he has established eligibility for that waiver.

First, he relies on *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992), in which the Ninth Circuit upheld the Department of Labor's ban on self-employment based alien employment certification. The Ninth Circuit stated:

> As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. The

> regulation's ban on self-employment makes it less likely that the certification process will be manipulated and "sham" employee searches conducted.

Id.

As with the Board of Labor Certification Appeals (BALCA) decisions on which the petitioner previously relied, although the Ninth Circuit upheld the Department of Labor's ban on alien employment certifications filed by self-employed individuals, that determination does mean that self-employed individuals are exempt from the alien employment certification requirement altogether or that USCIS must waive that requirement in the national interest. As stated in the most recent AAO decision in the matter currently on motion, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dep't of Trans.*, 22 I&N Dec. 215, 223 (Act. Assoc. Comm'r 1998) (*NYSDOT*). The Acting Associate Commissioner specifically stated:

> [USCIS] acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for an [alien employment] certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Id. at 218, n.5. Significantly, *NYSDOT,* a precedent decision that is binding on all USCIS personnel pursuant to 8 C.F.R. § 103.3(c), is more recent than the federal court decision on which the petitioner relies. The Acting Associate Commissioner is presumed to be aware of existing Department of Labor policy in denying alien employment certification for self-employed individuals when he issued the 1998 decision. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Moreover, the footnote quoted above reveals that the Acting Associate Commissioner was very aware that an alien must have a U.S. employer to apply for alien employment certification.

The petitioner also relies on an August 2, 2011 press conference where U.S. Citizenship and Immigration Services (USCIS) Director and U.S. Secretary of Homeland Security announced an initiative to remove barriers to the immigration of entrepreneurs. USCIS policy towards entrepreneurs is available on the agency's website. *See* http://www.uscis.gov/portal/site/uscis/menuitem.2182d258012d5eb62b6859c7526e0aa0/?vgnextoid=839a16ee27678310VgnVCM100000b92ca60aRCRD&vgnextchannel=7cf8760c124a7310VgnVCM10000025e6a00aRCRD. The guidance acknowledges that alien employment certification is difficult for entrepreneurs and states that most entrepreneurs filing under section 203(b)(2) of the Act will need to seek a waiver in the national interest pursuant to section 203(b)(2)(B) of the Act. *See* http://www.uscis.gov/

portal/site/uscis/menuitem.749cabd81f5ffc8fba713d10526e0aa0/?vgnextoid=0cf8f16d4d06e310VgnVCM100000082ca60aRCRD&vgnextchannel=0cf8f16d4d06e310VgnVCM100000082ca60aRCRD.

For petitioners with an advanced degree like the petitioner in this matter, the guidance does not indicate that every entrepreneur qualifies for the waiver. Rather, the guidance states that the petitioner must still meet the three prongs set forth in *NYSDOT,* 22 I&N Dec. at 215. *See* http://www.uscis.gov/portal/site/uscis/menuitem.2f0cb9a8ddc86a6d856fed10526e0aa0/?vgnextoid=485ce899de46e310VgnVCM100000082ca60aRCRD&vgnextchannel=0cf8f16d4d06e310VgnVCM100000082ca60aRCRD. While the petitioner also claims to be an alien of exceptional ability, USCIS guidance provides the same national interest waiver requirements for those petitioners. *Id.*[2] *See also NYSDOT,* 22 I&N Dec. at 218 (noting that by statute, "exceptional ability" is not, by itself sufficient cause for a national interest waiver).

First, the policy the petitioner cites does not support his previous eligibility claim, that as a self-employed individual there is no requirement for an alien employment certification and, thus, no waiver of that requirement is necessary. The website pages cited above unambiguously state that the classification sought does require an alien employment certification unless the petitioner establishes eligibility for a national interest waiver pursuant to section 203(b)(2)(B) of the Act. As stated above, a motion to reconsider is not the appropriate forum to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. at 220. Thus, the petitioner has not filed a proper motion to reconsider and the AAO may dismiss the motion on that ground alone.

Even if the AAO were to consider the national interest issue given prior adjudications that addressed it, the motion to reconsider does not establish that the AAO's most recent decision incorrectly applied *NSDOT* based on the record before it. As stated in the AAO's most recent decision, *NYSDOT,* 22 I&N Dec. at 217-18, provides three factors to be considered in adjudicating requests for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

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[2] When navigating the guidance, the user accesses diverging pathways explaining the different requirements for advanced degree professionals and aliens of exceptional ability, but both pathways eventually link back to the same page with the national interest waiver requirements.

On motion, the petitioner asserts that his potential to create jobs satisfies all three prongs set forth in *NYSDOT*.[3] While the practice of law and the creation of jobs at a law firm have substantial intrinsic merit, the petitioner has not specifically addressed how the proposed benefit will be national in scope or how he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The petitioner relies on recent guidance designed to help entrepreneurs understand the preexisting requirements for a national interest waiver. The petitioner, however, has not submitted the types of evidence the new guidance suggests as applicable on the website cited above, such as media reports, attestations from experts as to the national importance of the petitioner's work, published articles citing the petitioner's work, grants or other funding, contracts, patents and licenses.[4] *See* http://www.uscis.gov/portal/site/uscis/menuitem.2f0cb9a8ddc86a6d856fed10526e0aa0/?vgnextoid=485ce899de46e310VgnVCM100000082ca60aRCRD&vgnextchannel=0cf8f16d4d06e310VgnVCM100000082ca60aRCRD.[5]

As the petitioner has failed to cite any legal authority to establish that the previous AAO decision was based on an incorrect interpretation of law or policy, the most recent filing does not meet the requirements for a motion to reconsider and must be dismissed.

V. SUMMARY

The petitioner failed to submit a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding as required under 8 C.F.R. § 103.5(a)(1)(iii). In addition, the petitioner raises legal assertions that could have been raised previously. Finally, the petitioner did not cite any legal authority to establish that previous AAO decision was based on an incorrect interpretation of law or policy. For all of these reasons, the filing does not meet the requirements of a motion to reconsider and must be dismissed.

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[3] The petitioner also reasserts that there are humanitarian bases for the waiver. These bases were addressed in the AAO's most recent decision and on motion the petitioner cites no legal authority to suggest the AAO's discussion of those grounds was based on an erroneous application of law or policy.

[4] While the petitioner has submitted published material about the need for affordable legal services, this material does not relate to the petitioner personally or otherwise establish that what he proposes to do will be national in scope. As stated in the AAO's previous decision, *NYSDOT* explicitly states that the pro bono services of a single lawyer are too attenuated at the national level. 22 I&N Dec. at 217, n.3.

[5] The petitioner has been afforded multiple opportunities to provide evidence to establish eligibility for the national interest waiver under *NYSDOT* as follows: in response to the director's February 1, 2007 Request for Evidence, on appeal, and in support of the previous motion. Thus, the AAO would not consider any new evidence supporting a future motion to reopen. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The motion to reconsider will be dismissed.

ORDER: The motion to reconsider is dismissed. The AAO's decision of October 4, 2011 is affirmed. The petition remains denied.